No. 33080

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

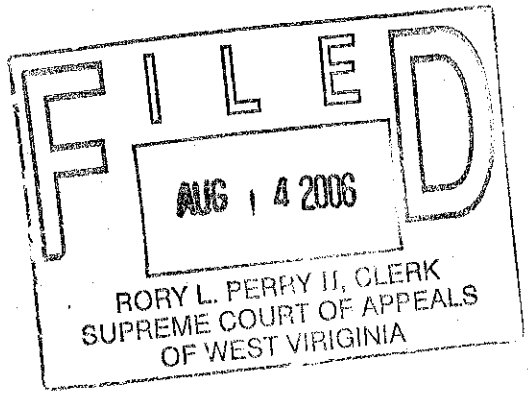
TERRY R. MACE and DONALD MACE,

Appellants,

Vs.

LIBERTY MUTUAL INSURANCE COMPANY, a Massachusetts Corporation

Appellee.



BRIEF OF APPELLANTS TERRY R. MACE AND DONALD MACE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

West Virginia Cases

Other Cases

Other Authorities

Federal Authorities

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Appellants and plaintiffs below, Terry R. Mace and Donald Mace, her husband, hereby submit the following facts, argument and authorities in support of their appeal from the final order of the Circuit Court of Kanawha County, Bloom, J., granting summary judgment to Appellee and defendant below, Liberty Mutual Insurance Company (sometimes referred to as "Liberty Mutual"), which judgment was the result of the trial court's abrogation of a legal standard expressly established by the West Virginia Supreme Court of Appeals in *Hannah v. Heeter,* 213 W.Va. 704, 584 S.E. 2d 560 (2003), and respectfully pray that such judgment be reversed and the case remanded for a trial on the merits.

I. The Kind of Proceeding and Nature of the Ruling in the Lower Tribunal

The proceeding below was a civil action brought by Mr. and Ms. Mace against their insurer, Liberty Mutual, based upon the negligent spoliation of evidence by the insurer. After discovery was complete, the respective parties filed competing motions for summary judgment on the issue of liability. On October 31, 2005, the Honorable Louis H. Bloom, Judge, granted the motion of defendant Liberty Mutual Insurance Company, finding that, under the circumstances of the case, Liberty Mutual owed no duty to plaintiffs to preserve evidence that was destroyed after coming into the insurer's possession and control. (Final Order Granting Summary Judgment, R-2590).[1]

II. Statement of the Facts

1. On the morning of February 4, 2002, while driving to work in a southerly direction on Interstate 77 in Jackson County, Terry Mace was seriously injured when the 1994 Ford Explorer she was driving went out of control and rolled over. (Police Accident Report, R-2067).

2. Ms. Mace's Explorer was, at the time of the rollover accident described above, insured under a policy of insurance issued by Liberty Mutual.

3. On April 19, 2001, more than nine (9) months prior to Ms. Mace's rollover accident, Liberty Mutual had filed a civil complaint in a fatal Explorer rollover case in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida, in which Liberty Mutual, as an intervening party plaintiff, made the following allegations, *inter alia:*

"21. Ford designed, manufactured, assembled, distributed, marketed and sold the

[1] References to documents in the Official Record, as paginated by the Circuit Clerk of Kanawha County, will be abbreviated as, for example, "R-2590").

Explorer, including the subject Ford Explorer, knowing that it would be used without inspection for defects.

...

"23. Ford placed the subject vehicle on the market in its defective condition, unsafe, and unreasonably dangerous for its intended use by foreseeable users in one or more of the following aspects:

(a) The vehicle is unstable in foreseeable handling situations;

(b) The vehicle had an unreasonable propensity to roll over;

(c) The vehicle lacked adequate warnings of the inherent instability of the vehicle and its propensity to roll over;

...

"27. The property damage to the Ford Explorer was proximally caused by the negligence of Ford, whose negligence consisted, among other things, of:

(a) Design, manufacture and assembly of a vehicle that was unstable in foreseeable handling situations;

(b) Design, manufacture and assembly of a vehicle that has an unreasonable propensity to roll over;

(c) Failure to advertise, label, instruct and warn of the inherent instability of the vehicle and its propensity to roll over;

...

(f) Failure to recall the Ford Explorer after Ford became aware of design and manufacturing defects described above."

Liberty Mutual's Complaint in *Touchton,* R-2071.

4. In the period of approximately ten (10) years prior to the Terry Mace accident, Liberty Mutual had paid out more than Seven Million Dollars ($7,000,000.00) in more than five hundred one (501) Explorer rollover accidents involving its insureds. Liberty Mutual Claims Spreadsheet (Under Seal), R-2081.

5. Within hours following his wife's accident, Donald Mace notified Liberty Mutual that his wife had been involved in a rollover accident while driving their Explorer, and reported to the insurer the injuries to Ms. Mace and damages to the vehicle. Transcript of Donald Mace

Interview, R-2082, 2083.

6. While Terry Mace was still hospitalized for the injuries she received in the aforesaid Explorer rollover accident, Liberty Mutual tendered documents to her that provided for a release of her interest in the Explorer and for transfer of title to Liberty Mutual. R-2084.

7. On or about February 17, 2002, Terry Mace, at Liberty Mutual's request and pursuant to her obligations under her policy of insurance, constituted the company as her attorney-in-fact; whereupon, Liberty Mutual undertook to exercise the rights of ownership of the vehicle. R-2084.

8. On or about March 2, 2002, after being released from the hospital and after a short period of convalescence at the home of her sister in Charleston, Terry Mace went to the Red Barn Wrecker Service salvage yard where her Explorer was being stored. As she was attempting to photograph her vehicle, she was told by an employee of the salvage yard that she had to leave; that the Explorer now belonged to the insurance company; that she would not be allowed to inspect the vehicle; and that the vehicle was "being taken away" later that day. Transcript of Deposition of Terry Mace, R-2085-2090.

9. Despite Liberty Mutual's actual knowledge of the defective nature of the Ford Explorer and Ford's negligence in designing the vehicle, as it had expressly alleged in the aforesaid civil complaint previously filed in Florida, on March 15, 2002, and despite its actual knowledge that its insured, Terry Mace, had a potential claim for the same design defects it had alleged against Ford, Liberty Mutual obtained salvage title AK08678, issued by the West Virginia Department of Motor Vehicles and, thereafter, had what was left of the Explorer transported to an automotive recycling facility in West Liberty, Kentucky, where it was subsequently destroyed. Transfer to

Grassy Auto Sales, R-2091.

10. After a period of recuperation, Terry Mace sought legal counsel, learned of her legal rights, and filed a product liability action against defendants Ford Motor Company, Inc., and Bert Wolfe Ford, Inc., in the Circuit Court of Kanawha County, West Virginia, alleging that the Explorer was defectively designed by reason of its inherent instability and inadequate resistance to rollover. After learning that the vehicle had been destroyed and the effect that the destruction of the evidence would have on her case against Ford, Ms. Mace filed an Amended Complaint, which included the evidence spoliation claim against Liberty Mutual. Her Amended Complaint alleged, *inter alia,* as follows:

> 50. As of the date of the accident, there existed a potential civil action on behalf of Appellee against defendants Ford Motor Company, Inc., and Bert Wolfe Ford, Inc.
>
> 51. As of the date of the accident, defendant Liberty Mutual, by reason of having paid out tens of millions of dollars to victims injured in other first-event, single-vehicle rollover accidents involving Ford Explorers manufactured and sold in the United States from Model Years 1991 through 2001; by reason of its own internal risk analyses and communications with attorneys representing Explorer rollover victims; and by reason of its own monitoring of insurance industry data reporting accident rates among sport utility vehicles, had actual knowledge of the potential civil action that could be brought on behalf of Appellee.
>
> 52. As of the date of the accident and thereafter, defendant Liberty Mutual had a duty to preserve the damaged Ford Explorer as evidence in any potential civil action alleging that the vehicle's defective design was the cause thereof, such duty arising out of (a) its contract of insurance with plaintiffs, or (b) its voluntary assumption of that duty, and/or (c) the special circumstances of Ford Explorer rollover cases in which Ford Motor Company has gone to great lengths to conceal from average citizens, consumers, the media and the government the dangerously defective design of Explorers from Model Years 1991 through 2001.
>
> 53. The Explorer was spoliated and/or damaged beyond usefulness as evidence while in the possession or under the control of agents and/or employees of defendant Liberty Mutual.

54. The spoliated evidence was vital to plaintiffs' ability to prevail in their potential civil action, which has now become a pending civil action, and the damage to and/or destruction thereof severely impairs the ability of their accident reconstructionist and vehicle dynamics experts to give definitive opinions on the issue of proximate cause in said pending civil action.

55. But for the aforesaid spoliation of evidence, plaintiffs clearly would have prevailed in their aforesaid action against defendants Ford Motor Company and Bert Wolfe Ford, Inc.

56. As a direct and proximate result of the foregoing negligent spoliation of evidence, for which defendant Liberty Mutual is liable, plaintiff Terry Mace suffered damages, for which said plaintiff is entitled to be compensated, including, but not limited to the loss of value of her claim against defendants Ford Motor Company and Bert Wolfe Ford, Inc., as well as all attorney fees incurred in prosecuting the underlying claims against said defendants.

11. Thereafter, the Maces settled their claim against Ford for a small fraction of its value in recognition of the fact that the defective product at issue in the case had been destroyed, and proceeded with their claim against Liberty Mutual.

12. After discovery was complete, the respective parties filed competing motions for summary judgment on the issue of liability. Liberty Mutual asserted that plaintiffs' proof had failed to meet two of the elements necessary, under the principles established in *Hannah v. Heeter,* 213 W.Va. 704, 584 S.E. 2d 560 (2003), to establish the tort of negligent spoliation. Those two elements, as set forth in *Hannah,* were (1) the existence of a pending or potential civil action, and (2) actual knowledge on the part of the spoliator of the pending or potential civil action. However, in making its motion and briefing the issues, Liberty Mutual changed the "pending or potential" language expressly set forth in *Hannah* to "pending or impending," thus effectively nullifying one of the two categories available to plaintiffs under the holding by the Supreme Court of Appeals. R-1900.

13. In their responsive brief, and in their own motion for summary judgment, plaintiffs below pointed out the nullifying nature of the substantive change of the terms "pending or *potential*" to "pending or *impending*" and the impropriety of such an attempt arbitrarily to abrogate a holding of the Supreme Court of Appeals. R-2153-2215; 2055-2096. Notwithstanding his being made aware of this substantive alteration of the express language of the Supreme Court of Appeals, the Honorable Louis H. Bloom, Judge, by Order entered on October 31, 2005, effectively adopted this arbitrary abrogation of the express legal standard and granted Liberty Mutual's motion, finding that, under the circumstances of the case, Liberty Mutual owed no duty to the Maces to preserve evidence that was destroyed after coming into the insurer's possession and control. R-2590.

14. In its order granting summary judgment to Liberty Mutual, the Court below based its holding upon two principal findings. First, the Court concluded, at Paragraph 3 of its Order, as follows:

> With respect to the first requirement of *Hannah,* the evidence is undisputed that *there was no pending or impending case* at the time the Plaintiffs sold their vehicle to Liberty… (Italics added). The Plaintiffs had not filed suit against Ford and never informed Liberty of any intention to file suit against Ford in the future. Thus, the Court concludes that the first requirement of *Hannah* is not met and Liberty is entitled to summary judgment.

R-2590-2598.

15. The Court below further concluded, at Paragraphs 4 and 5 of its Order, that, despite the facts that Liberty Mutual had itself previously filed a claim against Ford expressly alleging that the Explorer was dangerously defective and had paid out millions of dollars on hundreds of claims involving "upsets" of Explorers; and despite the fact that Liberty Mutual had been directly notified my Mr. Mace that his wife had been injured in the rollover of their Explorer, Liberty Mutual had not had "actual notice" as required under *Hannah.* R-2590-2598.

16. By the aforesaid order entered on October 31, 2005, the Honorable Louis H. Bloom, Judge, granted Liberty Mutual's motion for summary judgment. R-2590.

III. The Assignments of Error Relied Upon on Appeal and the Manner in Which They Were Decided in the Lower Tribunal

1. The trial court committed reversible error by attempting to abrogate the holding in *Hannah v. Heeter* by substituting the terms "pending or impending" for the "pending or *potential*" standard expressly stated by the Supreme Court of Appeals, resulting in a material departure from the express elements of the tort of intentional spoliation established in *Hannah.*

2. The trial court erred in failing to find that a person who was injured when her Ford Explorer rolled over had a potential civil action against the manufacturer, Ford Motor Company, where Liberty Mutual itself had demonstrated that fact in filing the Florida civil action alleging its right of subrogation to recover damages as the result of an Explorer rollover.

3. The trial court committed reversible error in concluding that Liberty Mutual, even after having filed its own civil complaint alleging that the Ford Explorer was defective, unsafe and unreasonably dangerous because of the inherent instability of the vehicle and its propensity to roll over, and having been directly informed by its insured that Ms. Mace had been injured in the rollover of her Explorer, had only "constructive notice," and not actual notice, of a potential claim that might be filed by its insured, who was injured when her Explorer rolled over.

4. The trial court erred in concluding that Liberty Mutual, after having paid out more than $7,000,000.00 in losses in more than five hundred one (501) Ford Explorer rollover claims, and after having filed its own civil complaint alleging that the Ford Explorer is defective, unsafe and unreasonably dangerous because of the inherent instability of the vehicle and its propensity to

roll over, did not have actual notice of the potential claim of its insured, who was injured when her Explorer rolled over.

IV. Points and Authorities Relied Upon, a Discussion of Law, and the Relief Prayed For

A. The Standard of Review

Where the issue on appeal from a circuit court is clearly a question of law, the Supreme Court of Appeals applies a *de novo* standard of review. Syl. Pt. 1, *Crystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995). This appeal clearly centers upon the circuit court's misapprehension, misinterpretation and/or abrogation of case law stated with perfect clarity by the Supreme Court of Appeals and is thus reviewed *de novo.*

B. The Trial Court's Abrogation of the Supreme Court's Holding in *Hannah*

The parties and the court below agreed that *Hannah* is controlling and provides the framework for resolution of the case. *Hannah* holds that the tort of negligent spoliation of evidence by a third party consists of the following elements: (1) the existence of a *pending or potential* civil action; (2) the alleged spoliator had actual knowledge of the *pending or potential* civil action; (3) a duty to preserve evidence arising from a contract, agreement, statute, administrative rule, voluntary assumption of duty, or other special circumstances; (4) spoliation of the evidence; (5) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action; and (6) damages. Once the first five elements are established, there arises a rebuttable presumption that, but for the fact of the spoliation of evidence, the party injured by the spoliation would have prevailed in the pending or potential litigation. The third-

party spoliator must overcome the rebuttable presumption or else be liable for damages. *See Hannah* at 570.

Even though the parties and the court below agreed that *Hannah* establishes the standards that must be met, Liberty Mutual succeeded in convincing the trial judge that the term "potential" as used in *Hannah* could be amended to "impending." The result, of course, is that plaintiffs would lose one of the two categories into which their claims might fall and thereby be held to a standard significantly more narrow than that set forth in the express language of the Supreme Court of Appeals. Under Liberty Mutual's unilateral and unprecedented re-writing of *Hannah,* fully adopted by the trial court, plaintiffs would have to have an *actually pending,* as opposed to *potential,* civil action. Under the judgment of the court below, the abrogation of the "potential claim" category established by *Hannah* meant that the Maces' claim, which had not actually been filed when Liberty Mutual destroyed the evidence, could not be maintained.

The terms "pending" and "impending" are, at best, interchangeable: *Black's Law Dictionary,* Fourth Edition, defines "pending" as "[b]egun, but not yet completed; during; before the completion of; prior to the completion of; unsettled; undetermined; in process of settlement or adjustment. Thus, an action or suit is 'pending' from its inception until rendition of final judgment." [Citations omitted]. "Impending" is mentioned nowhere in *Hannah;* nor is it a term even found in *Black's* Fourth Edition. Rather, it appears to be the gratuitous creation of Liberty Mutual's counsel, which was supplied to the court below as a rationale for abrogating *Hannah.* The term "potential," however, is quite distinguishable: "existing in possibility but not in fact; naturally and probably expected to come into existence at some future time, though not now existing...." The Supreme Court of Appeals in *Hannah*, with great clarity, set up the two distinct

categories. The court below, at the urging of Liberty Mutual, simply discarded the latter of the two categories, thereby excluding the claim of the Appellants, which can only be said to be clearly "potential" under the facts of this case. The moment Terry Mace rolled her Explorer, she had a *potential* product liability claim against Ford Motor Company, thus meeting the requirement expressly stated in *Hannah.* Only by distorting the language of *Hannah* and turning it into something it is not does the court below presume to abrogate this holding of the Supreme Court of Appeals. For this reason the lower court's judgment should be reversed.

C. Appellants Established the Five (5) Elements Required by *Hannah*

Appellants respectfully submit that they did, indeed, establish the five (5) elements necessary to recovery for negligent evidence spoliation under *Hannah,* namely: (a) the existence of a pending *or potential* civil action (met in this case by evidence that Terry Mace had been injured in an Explorer rollover accident, thus giving her a *potential* product liability claim against the vehicle manufacturer); (b) the alleged spoliator had *actual knowledge* of the pending or potential civil action (such actual knowledge being reflected by Liberty Mutual's prior Complaint in *Touchton, Liberty Mutual, et al, v. Ford Motor Co., et al*, alleging that the Explorer is defective and unreasonably dangerous, and its payment of claims in 501 previous Explorer rollover accidents totaling more than $7,000.000.00); (c) a duty to preserve evidence arising from a contract, agreement, statute, administrative rule, voluntary assumption of duty, *or other special circumstances* (Liberty Mutual being in a unique position with special knowledge not generally available to its lay customers; having taken possession of the evidence; having itself been a plaintiff in an Explorer rollover case; and having been previously found to have committed spoliation in a product liability action in Pennsylvania); (d) spoliation of the evidence (the Mace

vehicle was "destroyed" and a critical defective component, the Twin I-Beam suspension, is gone); and (e) the spoliated evidence was vital to plaintiff's ability to prevail in a pending or potential civil action (established by the Affidavit of plaintiff's expert, former Ford Vice President Thomas Feaheny, Exhibit No. 8 to Plaintiffs' Brief, who avers that plaintiffs encounter extreme difficulty in defending against Ford's spoliation motions and, in this case, but for the aforesaid spoliation of evidence, the Maces clearly would have prevailed on their product liability claim). R-2092-2904.

D. Liberty Mutual had Actual, not Merely Constructive, Notice of Plaintiffs' Claim

The Court's finding that Liberty Mutual had no "actual notice" of any pending or potential suit is flatly contradicted by the facts. The company's previous knowledge of the defects in the Explorer, expressed in its own Complaint in *Touchton* (R-2071), is undeniably "actual notice." It is axiomatic that a party filing a complaint in a civil action is held to have had a good-faith belief that the allegations therein are true. As a companion proposition, Liberty Mutual is equitably estopped from denying that it was aware of the Explorer defect allegations in the civil complaint it filed. It follows, then, that when Liberty Mutual received notification that Terry Mace had been injured in the rollover of her Explorer, the requisite connection between "actual knowledge" and a "potential claim," as contemplated by *Hannah v. Heeter,* was complete.

In a similar case decided by a federal court in Pennsylvania, a worker was injured in an incident involving the suspected failure of a chair during a hotel stay while on the business of his employer. Liberty Mutual, the employer's insurance carrier, voluntarily took possession of the

chair and, after examining it for its own purposes, Liberty Mutual's agent, Mr. Wagner, returned it to the hotel. The injured employee later sought to sue the manufacturer of the chair, but it could not be found. The employee then sued Liberty Mutual for spoliation of evidence and, as in the instant case, Liberty Mutual defended upon the grounds, *inter alia,* that it owed no duty to the employee to preserve the chair. The court disagreed, holding as follows:

> Plaintiff argues that even if defendant was initially under no duty to maintain the chair in protective custody, once defendant's agent took possession of the chair a duty arose to act as a reasonable man would under the circumstance s. Wagner's alleged breach of this duty is the legal basis for the present action.
>
> Under the general law of torts, a defendant may voluntarily assume a duty by affirmative conduct which would not exist in the absence of such conduct. *See* Prosser, *Handbook of the Law of Torts*, 4 ed. (1971), § 56 and cases cited therein. Under the law of Pennsylvania, a person who makes an engagement, even though gratuitous, and actually enters upon its performance, will incur tort liability if his negligence thereafter causes another to suffer damages. *Pascarella v. Kelley*, 378 Pa, 18, 105 A.2d 70 (1954); *Rehder v. Miller*, 35 Pa.Super. 344 (1908).
>
> The standard required in the performance of a duty created by affirmative conduct is reasonable care under all of the circumstances, and the duty may be terminated when circumstances permit by giving notice of the intention to terminate and disclosing what remains to be done. Prosser, *supra,* § 56.
> ....
>
> Breach of duty under Pennsylvania law is the failure to exercise reasonable care under all the circumstances of a particular situation. *Smith v. Philadelphia Transp. Co.*, 173 F.2d 721 (3rd Cir. 1949). Summary judgment is usually not appropriate in negligence cases, Wright and Miller, *Federal Practice and Procedure*, Civil § 2729, since the application of the standard of conduct of the reasonable man usually requires a full exposition of all the underlying facts and circumstances. While it is clear that plaintiff has the burden of proof with respect to assumption of a duty and its subsequent breach, it is equally clear that he is entitled to his day in court to present the evidence he has. We cannot speculate on the implications of the fact that plaintiff and defendant were at one time represented by the same law firm, nor upon the circumstances surrounding the custody and return of the chair to Marriott, particularly the instructions, if any, given by Wagner to the Marriott employee who accepted the chair, a matter which is in dispute. These disputed facts certainly bear on the breach of duty, if any, which occurred, and a fuller exposition at the trial on the merits will enable the

> court to make an informed judgment as to whether or not Wagner acted as a reasonable man would have acted under all of the circumstances.
>
> For these reasons, defendant's motion for summary judgment is denied.

Pirocchi v. Liberty Mutual Insurance Co., 365 F.Supp. 277, 282 (E.D. Pa. 1973).

The similarities between *Pirocchi* and the case at bar could not be more clear, and, just as Liberty Mutual's arguments failed in the former, they should also fail here. Liberty Mutual voluntarily took possession of the chair, knowing that it was the basis of a potential legal claim; likewise, the company voluntarily took possession of the Maces' Explorer, likewise knowing that it was the basis of a potential legal claim. Having thus taken possession of the evidence, Liberty Mutual owed a duty to preserve it. By any standard of reasonableness, Liberty Mutual should not have destroyed the Maces' Explorer while *knowing* that (1) its own product defect claim had been filed against Ford in *Touchton* and (2) Ms. Mace had been injured in an Explorer rollover. It would have been reasonable for Liberty Mutual to have informed the Maces of what the company knew about the Explorer's stability defect and to afford them the opportunity to preserve the vehicle until they made a determination as to whether to file a claim. Instead, Liberty Mutual kept to itself what it knew about the Explorer's defective design and proceeded with some haste to dispose of the evidence.

While it is, indeed, undisputed that the Maces voluntarily transferred their Explorer title to Liberty Mutual, that transaction cannot be said to exempt Liberty Mutual from its obligation not to destroy evidence. It is axiomatic that the preservation of evidence is fundamental to our system of justice, and Appellants cite substantial authorities holding insurers to a requirement that they preserve evidence. Indeed, in *Baliotis v. McNeil,* 870 F.Supp. 1285 (M.D. Pa. 1994),

the federal court faulted Liberty Mutual for destruction of evidence in a product liability/fire case. The insurer had allowed the destruction of a house damaged in a fire, even though it had identified the manufacturer of one of the suspect appliances as a subrogation target. The court held, 870 F.Supp. at 1290, that Liberty Mutual was *under a duty to preserve evidence which it knows or reasonably should know is relevant to the action.* "Accordingly," said the Court, "Liberty Mutual owed a duty to preserve evidence relevant to the origin and cause of this fire as soon as it identified a potentially responsible party." By contrast, in the case below, Liberty Mutual was not able to cite any authority for the proposition it seeks to advance, namely, that an insurance company having actual knowledge of a potential claim can be vindicated in its destruction of evidence supporting that claim by the mere fact that it acquired the victim's vehicle and could do with it as it pleased.

Appellants respectfully submit that central to the context of the discussion of applicable law is the undisputed evidence that, nine (9) months prior to the Mace accident, Liberty Mutual went into a court in Florida and filed a civil complaint alleging that the Explorer was defective, unstable and had an unreasonable propensity to roll over, and further alleging that Ford was negligent in the design of the Explorer. Liberty Mutual's actual knowledge of the design defects in the Explorer was laid bare as a matter of public record at that time. Appellants further submit that there can be no better evidence of actual knowledge than a formal statement, made in a court proceeding, averring that the Explorer is defective.

As has been shown in *Baliotis* and *Pirocchi,* Liberty Mutual is no stranger to litigation in cases involving an insurer's duty to preserve evidence. In *Baliotis* the federal court found as follows, 870 F.Supp. at 1290:

> A "litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action." *Fire Ins. Exchange v. Zenith Radio Corp.*, 103 Nev. 648, 651, 747 P.2d 911, 914 (1987). That duty arises as soon as a potential claim is identified. As explained in *Hirsch [v. General Motors Corp., 266 N.J.Super. 222 250, 628 A.2d 1108, 1122 (1993)]:*
>
> [A] duty to preserve evidence, independent from a court order to preserve evidence, arises where there is: (1) pending *or probable* litigation involving the defendants; (2) knowledge by the plaintiff of the existence or *likelihood of litigation;* (3) foreseeability of harm to the defendants, or in other words, discarding the evidence would be prejudicial to defendants; and (4) evidence relevant to the litigation. [emphasis added by the Court in *Baliotis.*]
>
> Liberty Mutual contends that at the time it authorized destruction of the fire scene it had not decided to pursue a subrogation claim. Liberty Mutual's assertion that a decision to pursue a subrogation claim was not made until 1992, when it retained outside counsel, is belied by the letter it sent to WCI in January of 1991, asserting, without equivocation, that WCI was responsible for this fire. More importantly, however, the knowledge of a *potential* subrogation claim is deemed sufficient to impose a duty to preserve evidence. See Fire Ins. Exchange, 103 Nev. at 651, 747 P.2d at 914. **Accordingly, Liberty Mutual owed a duty to preserve evidence relevant to the origin and cause of this fire as soon as it identified a potentially responsible party. [Emphasis supplied].**

Pirocchi was decided in 1973, nearly twenty (20) years before Ms. Mace's Explorer rollover accident. *Baliotis* came down in 1994, some eight (8) years before. Despite the lessons from these two cases, and despite the clear language of *Hannah,* Liberty Mutual destroyed the Maces' evidence after receiving actual knowledge of their potential claim.

CONCLUSION AND REQUEST FOR RELIEF

Appellants, therefore, having shown that the court below committed reversible error in abrogating the standards expressed in *Hannah;* having shown that Appellants have met all of the standards set forth in *Hannah;* and having shown that Appellee Liberty Mutual owed to them a duty to preserve the Ford Explorer as evidence in this case, respectfully pray that the judgment of the

court below be reversed and the case be remanded to the trial court for further proceedings consonant with the order of the Supreme Court of Appeals.

Respectfully submitted this 14th day of August, 2006.

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CERTIFICATE OF SERVICE

The undersigned, J. Miles Morgan, counsel for Appellant, hereby certifies that on this 14th day of August, 2006, he served a copy of the foregoing "Brief Of Appellants Terry R. Mace and Donald Mace" upon counsel of record for Appellee, *via* United States Mail, first class postage prepaid , addressed as follows:

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